STATEMENT OF
THE AMERICAN FARM BUREAU FEDERATION
TO THE
HOUSE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON ENVIRONMENT AND HAZARDOUS MATERIALS
REGARDING
SUPERFUND LAWS AND ANIMAL AGRICULTURE

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Presented by,
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Mr. Chairman and members of the subcommittee, my name is Steve Kouplen. I am president of the Oklahoma Farm Bureau (OFB) and a member of the board of directors of the American Farm Bureau Federation (AFBF), which represents the majority of the beef, hog and poultry producers in the country. Oklahoma Farm Bureau is the largest agriculture organization in our state with more than 162,000 member families. I appreciate the opportunity to address you today on a critical issue to the livestock industry.

I am a cattle rancher from Beggs in Okmulgee County in the eastern part of Oklahoma. I am a cow/calf producer running approximately 250 cows. Quite frankly, I and my colleagues in the industry are greatly concerned at the prospect that animal manure could be regulated as a hazardous waste. Farm Bureau firmly believes that Congress never intended that animal manure be considered a hazardous waste and regulated under the Comprehensive Environmental Response, Compensation and Liability Act or CERCLA. Yet some people are attempting to get the courts to do something Congress never did. There are other members of the panel that will speak to that issue, but I would like to reinforce our hope that Congress will provide policy

direction on this important matter. We ask that you affirm what we believe has been the consistent intent that animal manure is not a hazardous substance under Superfund.

Animal manure has been safely used as a fertilizer and soil amendment by many cultures all over the world for centuries. Where would the organic agriculture industry be without it? However, in recent years, we have seen litigation challenge the use of animal manure as a fertilizer by claiming contamination and damage to natural resources.

There are three lawsuits where CERCLA claims have been made or are being made. The first case, the City of Tulsa versus Tyson Foods, et. al., involved poultry companies with growers in the Lake Eucha watershed. Lake Eucha is a drinking water source for the city of Tulsa. In that case, the U.S. District Court for the Northern District of Oklahoma stated in 2003 that "phosphate is found in all living cells, is safe and is vital to life processes." Yet the court then said that because phosphate is comprised of dangerous elemental phosphorus, phosphate in animal waste is a hazardous substance under CERCLA. How can phosphate be both life giving on one hand and listed as a hazardous substance on the other? We disagree with the Tulsa court's ruling as a matter of science and a matter of law. Fortunately, the ruling was later vacated under a settlement agreement and cannot be cited as a legal precedent.

In the second case, the city of Waco versus Dennis Schouten, et. al., litigation was brought by the Texas city against 14 individual dairies in the Lake Waco watershed. The city of Waco is alleging that the phosphorus in cow manure is a hazardous substance. The federal judge in the case has not dismissed the issue. The Waco case is currently in the discovery phase and is

expected to go to trial next year. In this connection, I would direct the subcommittee's attention to an amicus brief filed in this case just last month by the Texas Department of Agriculture. It articulates in a thoughtful, straightforward manner exactly why the law and the science dictate another conclusion.

In my own home state of Oklahoma, our attorney general has filed a lawsuit, the State of Oklahoma versus Tyson Foods, et. al., asserting claims under CERCLA and the federal Solid Waste Disposal Act, alleging natural resources damages in the Illinois River watershed as a result of the improper application of poultry litter as fertilizer within the watershed. This case is proceeding.

Obviously, these developments are very troubling to farmers and ranchers. If normal animal manure is found, either in proceeding Waco or Oklahoma case, to be a hazardous substance under CERCLA, then virtually every farm operation in the country could be potentially exposed to liabilities and penalties under the act. We do not believe Congress ever intended such an outcome.

To be more to the point, if the court decides in favor of the Oklahoma attorney general, does that mean the entire Illinois River watershed is a Superfund site? What about my small cow/calf operation? If cow manure is hazardous substance, am I going to need a special permit and an incinerator to dispose of it? Would I need to utilize special hazardous waste transports to send it to the incinerator? If the phosphates in cow manure and chicken litter are hazardous, what about the phosphates used by people on their lawns? Could every green lawn in this county be

considered a Superfund site? What about the natural levels of phosphates found in nature? What about the animals that excrete the phosphates? Would they be considered producers of hazardous substance? On this issue, the science and common sense are in agreement. The life-giving phosphates in manure are not now, nor have they ever been, equivalent to the benzenes and PCBs that CERCLA has been addressing for the last 25 years.

It is disturbing to look at the impact of this litigation. In the Waco case, of the original 14 dairies, only five are left in the case. The others, with one exception, have settled with the city. Although the terms of those settlements are confidential, it is believed that the defendants either stopped operation of their dairies or agreed to the regulatory control sought by the city. The city has been successful because of the insuperable difficulties these small businessmen have in engaging in a legal battle against an entity with almost unlimited resources to litigate.

The state of Oklahoma has now put farmers and ranchers in a similar situation. Our attorney general signed a contingency contract with the same law firm that handled the multi-state tobacco settlement a few years ago. Some of the same local law firms in Oklahoma that experienced a financial windfall from the tobacco settlement, including the firm of a former state attorney general that reportedly received $30 million dollars in the tobacco settlement, have signed on to the contingency contract.

The Illinois River watershed contains a little over one million acres. In his lawsuit under the CERCLA claim, the attorney general is demanding damages for the cost to restore, replace or acquire the equivalent of natural resources, the compensable value of lost services resulting from

the injury to natural resources and the reasonable cost of assessing injury to the natural resources and the resulting damages in the watershed. A contingency contract signed between the attorney general and three outside law firms entitles the three firms to 33⅓ percent of any monetary damages received in the suit by judgment or settlement and 33⅓ percent of the value of any injunctive relief obtained. Those damages, however, are just for one watershed. The attorney general has threatened legal action in other eastern Oklahoma watersheds. If the attorney general is successful in this lawsuit, it could create an avalanche of copycat litigation across the nation. The domestic livestock industry would be driven from this country, the grain industry would be crippled and farm families and communities would be devastated.

Our attorney general has insisted he can extract damages from the poultry companies without harming the growers and the industry. What he doesn't understand is that poultry companies and poultry growers depend on one another. If the companies determine they must relocate to stay in business, the growers will be left with empty barns and millions of dollars in mortgages they cannot pay.

Our attorney general has said several times in public meetings that it is appropriate for consumers to pay a few more cents for chicken so that the poultry companies can pass through those extra cents for environmental clean-up. That is a short-sighted view, and it shows very little appreciation for the world market economy in which we all compete. This CERCLA litigation has those of us involved in livestock production worried about our future economic viability.

If you look past the sensationalism, you can see that there are already mechanisms in place to address environmental concerns. Those mechanisms can work – when they are properly funded, when they are given the time to work and when they are not ignored by those engaged in a litigious frenzy.

The state of Oklahoma has required animal waste management plans for poultry feeding operations since Jan. 1, 1999, or June 1, 1998, if the poultry feeding operation was in a "threatened" watershed. The plans are based on a phosphorus index adopted by our state USDA Natural Resources Conservation Service. The state of Arkansas requires that producers must have their nutrient management plans implemented by Jan. 1, 2006; it should be noted that many poultry companies required their growers to have nutrient management plans before the state of Arkansas made it mandatory.

States can address issues of shared concern through interstate compacts, as pointed out by Arkansas Attorney General Mike Bebee in the petition he filed before the U.S. Supreme Court earlier this month. In fact, in the "Statement of Joint Principles and Action," signed by representatives of Arkansas and Oklahoma in December 2003, the states agreed to work together in a partnership, acting through their environmental agencies, with the Arkansas-Oklahoma Arkansas River Compact Commission toward the goal of producing a watershed plan, meaning a Clean Water Act 319 plan. To my knowledge, the state of Oklahoma has not pursued a joint watershed plan, although watershed groups are organizing in Arkansas. However, the state of Arkansas has followed through with its commitment to pass regulations for nutrient management, per the 2003 agreement.

The poultry companies have made offers to move so-called excess litter out of certain watersheds in Oklahoma, but those offers have been rejected by our attorney general.

There are a couple of issues that have been overlooked in the Oklahoma litigation. The first issue is that no administrative actions have been brought against the poultry growers and the companies by the state regulating agency or by EPA. To my knowledge, the poultry growers in the Illinois River watershed have not violated the Oklahoma poultry feeding operation statutes. Oklahoma's poultry operators, as most producers across the nation, understand that they must comply with the Clean Water Act and its regulations. They understand that they are liable for discharges not properly permitted under the Clean Water Act.

The second issue that has been overlooked in the Oklahoma litigation is the fact that the poultry growers own their litter. If the growers lose the use of their litter, they will be economically damaged. You might wonder why the Oklahoma attorney general didn't file CERCLA claims against the poultry growers in the Illinois River watershed. Perhaps it's because it would be politically unpopular to sue farmers. Also, poultry growers don't have the deep pockets that can be so attractive to law firms working on a contingency basis.

Speaking for those of us involved in livestock production, we need Congress to act. We are not asking to be excused from meeting our environmental responsibilities under the Clean Water Act or any other applicable federal law or regulation – we are meeting them. We are simply asking Congress to clarify what some of us felt was quite clear from the beginning – animal manure is

not considered a hazardous waste under CERCLA. We believe Congress never intended for animal manure to be regulated under CERCLA. Congress needs to reaffirm this now. We need some common sense that will protect us from those who would litigate us out of business. Thank you for attention. I would be happy to answer any questions.

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